IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.394 OF 2003

M/s.R.N.Ghanekar & Co. ... Petitioners.

vs.

Municipal Corporation of Gr. Mumbai. ... Respondents.

Mr.D.D.Madan i/b. M/s.Dhruve Liladhar & Co., for Petitioners.

Mr.R.D.Dhanuka with H.C.Pimpale, for Respondents.

AND

ARBITRATION PETITION NO.425 OF 2003

Municipal Corporation of Gr. Mumbai. ... Petitioners.

Vs.

M/s.R.N.Ghanekar & Co. ... Respondents.

Mr.R.D.Dhanuka with H.C.Pimpale, for Petitioners.

Mr.D.D.Madan i/b. M/s.Dhruve Liladhar & Co., for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 11th April,2005

P.C.:-

1. Both these petitions challenge the same Award made by the sole Arbitrator, directing the Municipal Corporation of Greater Mumbai to pay certain amounts to the Contractor M/s.R.N.Ghanekar & Co.. The learned Counsel for the Municipal Corporation for Greater Mumbai submits that the Award made by the learned Arbitrator is liable to be set aside on the preliminary point that the reference of the dispute to the Arbitrator was barred by law of limitation. According to the learned Counsel, even the claims made by the Contractor which have been rejected by the learned Arbitrator and in relation to which the contractor has filed the Arbitration Petition no.394 of 2003, are also liable to be rejected on the ground that they are barred by law of limitation. According to the learned Counsel, before the Arbitrator, the Contractor claimed the amounts due to the contractor on account of overheads from October,1994 till 25th September,1996. According to the learned Counsel, the cause of action of the contractor to make a reference to the Arbitrator in relation to these claims arose when the contractor became entitled to claim these amounts according to the contract. The learned Counsel submits that the cause of action for going to arbitration arise on the date on which, had there been no arbitration clause between the parties, the cause of action for institution of suit would have arisen. The learned Counsel submits that the entitlement to claim the overheads would accrue to the contractor, if at all he is entitled to, from October,1994 onwards, and therefore, the claim for overheads

of each month will have to be made within a period of three years from the accrual of cause of action for claiming overheads. According to the learned Counsel, the period of limitation for the purpose of arbitration stops running when a notice for referring the matter to the arbitration is issued. In the present case, that notice was given on 3rd October,2000 and according to the learned Counsel, therefore, the reference is barred by the Law of Limitation, even if the date of the last claim for overheads viz. 25.9.1996 is taken to be the date of accrual of cause of action.

2. On the other hand, the learned Counsel appearing for the Contractor submits that so far as the claim for overheads for the period from October,1994 till 31st March,1996, as also for the period beyond 31st March,1996, were made before the Chief Engineer and he was requested to make payment. On 3rd February,1998, on failure of the Chief Engineer to make payment, a reference was made to the Commissioner on 3.2.1998. Both these claims made, one to the Engineer and the other to the Commissioner were rejected by the Engineer by his letter dated 6th January,2000, whereby he stated that only the amount of Rs.63,370/- the Corporation is liable to pay. The learned Counsel submits that thus, the cause of action for making a reference to arbitration arose on 6th January,2000, and therefore, the reference made on 3rd October,2000 was within the period of limitation. The learned Counsel submits that the Arbitrator was not justified in holding that the claim for the period after 31.3.1996 was not referred to the arbitration, because according to the learned

Counsel, in the letter dated 17.5.1996 the demand was made for the overheads for the period subsequent to 31.3.1996. In my opinion, to decide the rival submissions, it is necessary to refer first to clause 96 and 97 of the Contract between the parties, they read as under :-

> "96. Any dispute or difference to be referred to Commissioner:-
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> If any doubt, dispute or difference arises or happens between the Engineer or any other officer on the one hand and the Contractor on the other hand, touching or concerning the said works or any of them, or relating to the quantities, qualities, description or manner of work done and executed by the Contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, deductions, alterations, or deviations made into or from the said works or any part of them, or touching or concerning the meaning or intention of this contract or of any part thereof or of any plans, drawings, instructions or directions referred to therein or which may be furnished, or given during the progress of the works, or touching or concerning any certificate, order, or reward which have been made or in any way whatsoever relating to the interests of the Municipal Corporation or of the Contractor in the premises, every such doubt, dispute and difference shall from time to time be referred to the Commissioner who shall give his decision within a period of 90 days and if the contractor is not satisfied with the decision of the Commissioner or the Commissioner fails to give the decision within the period of 90 days, such dispute may be referred to arbitration as per condition no.97.

97. Arbitration:-

All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract or the construction meaning operation or effect thereof or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after determination, foreclosure or breach of the contract (other than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration.

Arbitration shall be effected --

i) by an Arbitrator agreed upon by the parties or failing agreement upon such an Arbitrator,

ii) by an Arbitrator appointed by the President for the time being of the Institute of Engineers (India) or by the President of the Bombay Centre of the Institute of Engineers (India), or failing such appointment,

iii) by an Arbitrator appointed by the Chief Engineer, Buildings and Communication Department, Government of Maharashtra, or failing such appointment.

iv) By an Arbitrator appointed in accordance with the provisions of the Indian Arbitration Act which law governs the contract.

The Arbitrator so appointed shall be a person presently

unconnected with the organisation for which and by which the work is executed.

Submission to arbitration shall be deemed to be a submission to arbitration within the meaning of the Indian Arbitration Act, which law governs the contract.

If the Arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole Arbitrator shall be appointed as aforesaid.

The work under the Contract shall, if reasonably be possible, continue during the Arbitration proceeding and no payment due or payable to the contractor shall be withheld on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator may, from time to time with the consent of the parties, enlarge the time for making and publishing the award.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of Arbitration shall be within the limits of Greater Bombay. As per slip attached “X”.

“X” :- The following sentence appearing in Clause 98 should be

> deleted therefrom and added as the last sentence in Clause 97 is the award of the Arbitrator shall be final and binding on both the petitions."
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> The fees, if any, of the Arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the Arbitrator) shall be in the discretion of the Arbitrator who may direct to and by whom and in what manner, such costs or any part thereof be paid and may fix or settle the amount of cost to be so paid."

Perusal of the above quoted clauses shows that if any dispute arises between the Contractor and the Engineer, then that dispute has to be referred first to the Commissioner. The Commissioner has to decide that dispute within a period of 90 days. If the Commissioner decides the dispute and the Contractor is not satisfied with the decision or if the Commissioner fails to decide the dispute within a period of 90 days, then a reference can be made of that dispute to the Arbitrator. According to the contractor, clause 96 and 97 are to be read separately in the sense that first for making a reference of dispute to the Engineer, the Contractor will get a period of three years. If that is done within a period of three years, then on the decision of that dispute, a reference can be made to the Commissioner and on failure of the Commissioner to decide the dispute within a period of 90 days or if the Commissioner decides the dispute but the Contractor is not satisfied with the decision of the Commissioner then

within a period of three years from the date of that decision, a reference can be made to Arbitration. In my opinion, the submission is not well founded. The clause 96 of the Contract lays down the steps that have to be taken before referring the dispute to arbitration. The period of limitation applies for making a reference to arbitration. The Scheme of clause 96 and clause 97 is that, as soon as the Contractor becomes entitled to any payment from Corporation, under the contract, he has to lodge the claim with the Engineer, in case the engineer does not direct the payment to be made within a reasonable period, the contractor has to lodge his claim with the Commissioner, if the Commissioner rejects the claim within 90 days or does not take any decision on the claim within a period of 90 days, then the Contractor has to invoke the arbitration clause. From the date when, according to the Contractor, he becomes entitled to the payment, the reference to arbitration has to be made within a period of three years. The period of limitation commences from the date the right to claim the amount accrues to the Contractor, at the most a contractor my be said to be entitled to claim exclusion of the period of 90 days during which time the matter remains with the Commissioner. In my opinion, the learned Counsel for the Corporation has therefore, rightly relied on the judgement in the case "Steel Authority of India Ltd. Vs. J.C.Budharaj, Government and Mining Contractor, AIR 1999 Supreme Court 3275." The Supreme Court in that judgement in paragraph 27 has observed thus:-

"27. For deciding this controversy, we would first refer to the

decision of this Court in the State of Orissa V. Damodar Das (1996) 2 SCC 216: (1996 AIR SCW 351 : AIR 1996 SC 942) wherein this Court held that S. 3 of the Limitation Act, 1963, enjoys the Court to consider the question of limitation whether it is pleaded or not. The Court in paragraph 5 held as under:-

"Russell on Arbitration by Anthony Walton (19th Edn.) at pp.4-5 states that the period of limitation for commencing an arbitration runs from the date on which the "cause of arbitration" accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require than an arbitration take place upon the dispute concerned. The period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued:

"Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued.

Even if the arbitration clause contains a provision that no cause of action shall accrue in respect of any matter agreed to be referred to until an award is made, time still runs from the normal date when the cause of action would have accrued if there had been no arbitration clause."

In paragraph 27, the Supreme Court has referred to its own decision in the case

"Orissa V. Damodar Das, AIR 1996 SC 942" and has held that the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. In paragraph 28 of that judgement, the Supreme Court has observed thus:-

> "28. The Court also referred to the earlier decision in Panchu Gopal Bose V. Board of Trustees for Port of Calcutta (1993) 4 SCC 338: (1994 AIR SCW 1335: AIR 1994 SC 1615), where the Court observed as under (para 11 of AIR):-
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> "The period of limitation for commencing an arbitration runs from the date on which the cause of arbitration accrued, that is to say, from the date when the claimant first acquired either a right of action or a right to require that an arbitration takes place upon the dispute concerned.
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> Therefore, the period of limitation for the commencement of an arbitration runs from the date on which, had there been no arbitration clause, the cause of action would have accrued. Just as in the case of actions the claim is not to be brought after the expiration of a specified number of years from the date on which the cause of action accrued, so in the case of arbitrations, the claim is not to be put forward after the expiration of the specified number of years from the date when the claim accrued."

3. The learned counsel for the Contractor relied on the judgement in

the case “Major (Retd.) Inder Singh Rekhi V. Delhi Development Authority, AIR 1988 SC 1007” to contend that unless the claim is denied, the cause of action cannot be said to have arisen. Perusal of the judgement of the Supreme Court in the “Steel Authority of India Ltd. Vs. J.C.Budharaj, Government and Mining Contractor, AIR 1999 Supreme Court 3275.”, referred to above, shows that in paragraph 30 the Supreme Court has referred to this Judgement in the case “Major (Retd.) Inder Singh Rekhi V. Delhi Development Authority, AIR 1988 SC 1007”, and after considering that judgement, the Supreme Court has taken the above referred view. In my opinion, therefore, the cause of action for making a reference to the arbitration would arise from the date on which the right to claim the amount arises and therefore, a reference has to be made within a period of three years from the date of accrual of cause of action. The steps that are required to be taken under clause 96 have to be taken within the period of limitation and the period that is taken up for taking steps under clause 96 cannot be excluded while counting the period of limitation. In view of the judgement of the Superme Court, referred to above, in the case “Steel Authority of India Ltd. Vs. J.C.Budharaj, Government and Mining Contractor, AIR 1999 Supreme Court 3275.”, in my opinion, the learned Arbitrator was not justified in saying that the cause of action arose when the claim was rejected by the Engineer, and as admittedly the reference to arbitration has not been made within a period of three years from the date on which the cause of action viz. right to claim amounts arose, all the claims made by the Contractor are barred by the Law of Limitation. In the result, therefore, the Arbitration

Petition no.425 of 2003 succeeds and is allowed and the Award impugned is set aside. The Arbitration Petition no.394 of 2003 fails and dismissed. The contractor is directed to pay costs of both the petitions to the Corporation as incurred by the Corporation.

4. In the face of the view that has been taken on the question of Law of Limitation, it is not necessary for me to go into the other aspects of the matter.